

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0006**

State of Minnesota,
Respondent,

vs.

David Steven Selnick,
Appellant.

**Filed March 24, 2009
Affirmed
Klaphake, Judge**

Hennepin County District Court
File No. 27-CR-06-032854

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Anna Krause Crabb, City of Minnetonka, 14600 Minnetonka Boulevard, Minnetonka, MN 55345 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant David Selnick challenges his conviction of gross misdemeanor harassment in violation of Minn. Stat. § 609.749, subd. 2(a)(4) (Supp. 2005), claiming that the prosecutor improperly elicited trial testimony from a police officer suggesting that appellant would have to offer his version of the facts in order to avoid criminal prosecution. Because the prosecutor's elicitation of testimony from the officer was isolated, was immediately addressed by the district court in a curative jury instruction, and otherwise did not meet the harmless error test for reversal, we conclude that the district court properly denied appellant's motion for a new trial. We therefore affirm.

DECISION

"The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor may commit misconduct by engaging in acts that "undermin[e] the fairness of a trial," including violating "clear commands in this state's case law." *Id.*; see *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005) (stating that the prosecutor "must avoid inflaming the jury's passions and prejudices against the defendant") (quotation omitted)).

Appellate courts apply a harmless error analysis to claims of prosecutorial misconduct when defense counsel has objected to the misconduct at trial. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006); *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). This standard mandates reversal only if the misconduct, considered in the

context of the whole trial, deprived the defendant of a fair trial. *Mayhorn*, 720 N.W.2d at 785. A prosecutor's error is harmless if the verdict ultimately reached by the jury was surely unattributable to the error. *Id.*

During appellant's three-day trial on charges of stalking and harassment, the prosecution elicited the following testimony from Officer Alison Mickman about her attempts to encourage appellant to provide his version of the facts:

Q [by Prosecutor Anna Crabb]: And Officer Mickman, does that refresh your recollection, looking at the report, what the Defendant told you he would do if you continued to call him?

A: Yes. He told me he would file harassment against me if I continued to call him.

Q: What was your response to what he told you?

A: Advised him that in order to avoid these criminal charges he would have to speak with me and tell his side of the story.

Q: What did he do at that point?

A: He then hung up the phone.

[Defense Counsel Jerry Strauss]: Objection.

Here, appellant's constitutional right to remain silent, guaranteed by the United States and Minnesota constitutions, may be implicated in the colloquy. See U.S. Const. amend. V; Minn. Const. art. I, § 7. "Evidence that a defendant exercised his right[] to remain silent . . . is generally inadmissible at trial." *State v. Penkaty*, 708 N.W.2d 185, 199 (Minn. 2006); *State v. Combs*, 292 Minn. 317, 322, 195 N.W.2d 176, 179 (1972) (noting that prosecution may not comment on fundamental rights, including a defendant's

right to remain silent). The right to remain silent generally attaches after the arrest, however. *See State v. Dobbins*, 725 N.W.2d 492, 509 (Minn. 2006) (stating that prosecutor may not comment on defendant’s “post-arrest silence”); *State v. Billups*, 264 N.W.2d 137, 139 (Minn. 1978) (same).

Even if this court were to extend the right to remain silent to appellant’s pre-arrest conduct, any misconduct by the prosecutor is harmless in this case. First, the reference to appellant’s failure to give a police statement was isolated, appearing only once in a three-day trial. *See State v. Haynes*, 725 N.W.2d 524, 530 (Minn. 2007) (considering whether improper prosecutorial cross-examination was “isolated” for purposes of plain error analysis). Second, the jury acquitted appellant on the stalking charge, which suggests that it was not influenced by any prosecutorial misconduct. *See State v. DeWald*, 463 N.W.2d 741, 745 (Minn. 1990) (noting that even where record showed prosecutorial misconduct, acquittal of one count “indicat[ed] that the members of the jury were not unduly inflamed by the prosecutor’s comments”). Third, the district court gave an immediate and complete curative instruction setting forth appellant’s right to be silent and directing the jury to disregard the improper evidence; the court also instructed the jury at the close of evidence on the presumption of innocence and burden of proof. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (stating presumption on review that the jury followed district court’s instructions). These instructions reduced any prejudicial effect of Officer Mickson’s testimony.

Finally, contrary to appellant’s claim, the evidence against appellant was strong. The record included the testimony of the victim, B.E., who described appellant’s conduct

that constituted the offense of harassment, and this evidence was corroborated by evidence of appellant's own statements on recorded messages retrieved from B.E.'s cell phone. For all of these reasons, we observe no error in the district court's decision to deny appellant's motion for a new trial on the basis of prosecutorial misconduct.

Affirmed.